United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

894

BRIEF FOR THE APPELLANT AND JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Appellant

v.

D. C. TRANSIT SYSTEM, INC., a self-insured corporation,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL EARDLEY,
Acting Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

JOHN C. ELDRIDGE,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the district court erred in terminating an employee's workmen's compensation award under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., on the ground that the employee had become eligible for and was receiving pension benefits under a contributory pension system.

2. Whether the district court erred in directing that the employee's compensation award be reduced on a ground not raised by the employer at the administrative proceeding.

I N D E X

C I T A T I O N S

Cases:

Cases Continued:

Statutes and Regulations:

* Authorities chiefly relied upon are marked by an asterisk.

Statutes (Continued): Page

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Appellant

v.

D. C. TRANSIT SYSTEM, INC., a self-
insured corporation,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

This action was brought by the appellee, a self-insured employer, against the Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, and an insured employee, to obtain judicial review of a compensation order issued under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921 (J.A. 2-6). On cross motions for summary judgment,

the district court, per Holtzoff, J., remanded the cause to the Deputy Commissioner with directions to modify the compensation order by discontinuing the award of compensation benefits as of September 1, 1964, the date the employee began receiving retirement benefits under a contributory pension plan (J.A. 28). The Deputy Commissioner filed a notice of appeal on March 2, 1967 (J.A. 29), and the insured employee filed a notice of appeal on March 3, 1967 (No. 20902). 1/ This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This action was brought by the employer, a self-insurer, to obtain judicial review of a compensation order issued under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 921), made applicable to the District of Columbia by D.C. Code (1961 ed.) sec. 36:501.

The employee, William G. White, had worked for the D. C. Transit System, Inc. and its predecessors for 40 years: 28 years as a bus driver and twelve years as a street car conductor. On July 19, 1963, while walking in the employer's garage, he wasinjured in an accident (J.A. 7-8). The injury concededly arose out of and in the course of his employment.

1/ By order of this Court entered May 19, 1967, the appeals were consolidated.

Upon the employee's application for benefits, the Deputy Commissioner found that the employee had sustained both a physical injury and a post-traumatic psychoneurosis as a result of the accident (J.A. 8). The Deputy Commissioner found that the injuries would render the employee totally disabled until November 19, 1965 (J.A. 8). Consequently, the Deputy Commissioner made a temporary total disability award of $8,540, representing 122 weeks of compensation at $70.00 per week to November 19, 1965 (J.A. 9).

The employer acquiesced in the administrative determination to the extent that the Deputy Commissioner had found that the employee suffered a disabling physical injury arising out of and in the course of his employment. Thus, the employer paid $3,780.00, representing compensation benefits through July 31, 1964, when all physical disability had ceased (JA. 9). However, the employer sought judicial review of the administrative decision insofar as it related to the mental disability, contending that the claim for the period subsequent to July 31, 1964, was barred on the ground that there was no causal connection between the mental disability existing after that date and the accident (J.A. 3, 16).

In the district court, the employer referred to the fact that the employee had retired at the age of 62, effective September 1, 1964, and was receiving $236.00 per month as a retirement annuity under the D.C. Transit System, Inc. Employees' Retirement plan, a contributory pension system (J.A. 11, 25).[2] However, the employer at no time suggested that the compensation benefits should be discontinued as of September 1, 1964 -- the date of the employee's retirement.[3] Furthermore, no such contention had been made by the employer in the administrative proceedings.

On cross motions for summary judgment, the district court, Holtzoff, J., upheld as supported by substantial

---

2/ The district court asked whether D. C. Transit System had a pension system in addition to social security benefits (J.A. 18), and counsel for the employer pointed out (J.A. 19):

> The hourly rated employees covered by the Transit Union provisions have an excellent pension plan. * * * It is contributory, of course. They contribute a portion and the company contributes two and a half times as much * * *.

The pension agreement, not part of the record below, shows that the employee contributes 4 1/2 percent of his weekly salary and the employer, twice the aggregate amount of the employee's contribution, infra.

3/ The employee's average weekly wage at the time of his injury was $111.10 (J.A. 24). At the time of the hearing in September 1965, he received $236.00 per month in a retirement allowance (J.A. 11, 25) plus $121.00 in Social Security payments (J.A. 11, 25).

evidence the Deputy Commissioner's finding that the claimant was totally disabled by the mental injury, and that the mental injury occurred as a result of the accident (J.A. 25). The court, however, ruled sua sponte that the compensation award to the employee should be discontinued as of September 1, 1964 -- the date of his retirement -- and ordered that the award be so modified (JA. 27). The court reasoned (J.A. 25-26):

> * * * To be required to pay Workmen's Compensation in addition to the pension is to exact double payments from the employer. * * * An injured workman, who some time after he is injured, retires and receives a pension under a system maintained by his employer no longer loses any wages. He is out of the industrial ranks for the rest of his life. His financial requirements are taken care of by the pension. It follows hence that to allow Workmen's Compensation over and above his pension, in effect, constitutes double payment. The situation would be entirely different if the workman received an income from an outside, unrelated source, whether by way of insurance maintained by himself or as a gift or gratuity from someone.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., are as follows:

33 U.S.C. 908 provides:

* * *

> (b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

33 U.S.C. 921. Review of compensation orders

* * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

33 U.S.C. 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after

> the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation, previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by the approval of the Secretary.

SUMMARY OF ARGUMENT

1. The district court erred in directing the termination of an employee's workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act on the ground that the employee received a pension allowance under a pension scheme to which the employee himself had contributed. The only statutory grounds for modification of an award are the termination of the disability or a mistake in an earlier determination of fact by the Deputy Commissioner (33 U.S.C. 922.) And the only test as to whether an employee is entitled to benefits, is the decrease in the wage earning capacity of the employee and not the economic resources available to the employee. (Hartford Accident and Indemnity Co. v.

Hoage, 66 U.S. App. D.C. 163, 85 F.2d 420, Pistorio v. Einbinder, 122 U.S. App. D.C. 39, 351 F.2d 204, 207.

Furthermore, in construing similar workmen's compensation statutes, the courts have held that where, as in the case at bar, neither the statute nor the pension agreement prohibits the receipt by an employee of both pension and compensation benefits, the employee is entitled to receive both. See e.g, Pisapia v. Newark, 47 N.J. Super. 353, 136 A.2d 67 (1957); Montgomery County v. Kaponin, 237 Md. 112, 205 A.2d 292 (1964); Southwestern Bell Telephone Company v. Siegler, 240 Ark. 132, 393 S.W. 2d 531 (1966); Vaninon v. Textile Machine Works, 183 Pa. Super. 181, 130 A.2d 203 (1957). And in the analogous situation where an employee receives a tort judgment against his employer, the courts have held that his retirement benefits "should not be offset against the sum awarded for the tort nor considered in determining that award." United States v. Price, 288 F.2d 448 (C.A. 4).

2. Even assuming, arguendo, that as a general matter benefits under the Longshoremen's and Harbor Workers' Compensation Act should cease when the employee becomes entitled to retirement benefits, the district court in this case erred in terminating the employee's compensation benefits sua sponte and on a ground not presented to the Deputy Commissioner.

Britton v. Great American Indemnity Co., 110 U.S. App. D.C. 190, 290 F.2d 381, certiorari denied, 368 U.S. 900. Metropolitan Casualty Ins. Co. v. Hoage, 67 U.S. App. D.C. 54, 89 F.2d 798, cf., United States v. Tucker Truck Lines, 344 U.S. 33, 37. Throughout the proceedings before the Deputy Commissioner (J.A. 11-14) and the district court (J.A. 15-21), the employer never asserted as an alternative argument that the employee's workmen's compensation benefits should run only to the date the employee would become eligible for a pension. The employer merely asserted that the employee was not entitled to benefits for the periods subsequent to July 5, 1964, on the ground that there was no causal connection between the mental disability existing after that date and the accident (J.A. 11). One reason for the rule requiring that an issue first be raised before the administrative body is to enable all parties to offer evidence relevant to the issue which the trier of fact would be required to pass upon. In this case, the employer's failure to raise the issue prejudiced the other parties, for there was critical evidence, the D.C. Transit System Inc. Employee's Retirement Trust Agreement and Plan, which was presented neither to the Deputy Commissioner nor to the district court. This agreement expressly provided, contrary to the result reached by the district court, that "Pension allowances are in addition to any other income which an employee may have, * * * especially

in addition to any benefits received under workmen's compensation." If the employer had raised the issue administratively, the employee would have been able to submit this evidence in rebuttal.

ARGUMENT

I. AN EMPLOYEE'S RECEIPT OF RETIREMENT BENEFITS UNDER A CONTRIBUTORY PENSION SYSTEM FURNISHES NO GROUND FOR TERMINATING HIS AWARD ~~BENEFITS~~ UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. 901 ET SEQ.

The district court held that the Deputy Commissioner's finding, that William Guinn White was totally disabled by a neurosis that developed as a result of an accident arising out of and in the course of his employment, was supported by substantial evidence. Thus the award of compensation benefits for temporary total disability was justified. However, the district court sua sponte ordered the award terminated as of the date that the claimant became eligible for and received a retirement annuity under a contributory pension system. In terminating the award of workmen's compensation benefits on the ground that the employee was already receiving a retirement annuity, paid for in part by the employee himself, the district court was plainly in error.

The Longshoremen's and Harbor Workers' Compensation Act contains no provision providing that compensation benefits be terminated if the employee receives pension benefits.

The only test for benefits is a disability arising out of and in the course of the employment, and the only statutory grounds for modification of the award are the termination of the disability or a mistake in an earlier determination of fact by the deputy commissioner, 33 U.S.C. 922, supra, p. 6-7.[4/] The district court, therefore, added a ground for terminating compensation benefits awarded under the Longshoremen's and Harbor Workers' Compensation Act which is nonexistent in the statute.[5/]

Moreover, the decisions under the Longshoremen's and Harbor Workers' Act expressly hold that the economic needs of

---

4/ The Act provides that a district court may set aside a compensation order, "if not in accordance with law" 33 U.S.C. 921(b). This Court long ago pointed out that "a reviewing court must look to see, not whether the principles of law applied by the Deputy Commissioner are correct, but merely whether they are forbidden by law, or without any reasonable basis, or are invalidated by some formal principle of law." Hurley v. Lowe, 83 U.S. App. D.C. 123, 168 F.2d 553, certiorari denied 334 U.S. 828. Here there is no statutory provision prohibiting the payment of compensation benefits when the employee is also entitled to a pension.

5/ Where Congress intends that benefits under a statute be reduced because of the receipt of other income or benefits, it expressly provides for such reduction. For example, in the Social Security Act, Congress provided for the imposition of deductions, from old age insurance benefits because of wages earned, 42 U.S.C. 403, and for the reduction of disability insurance benefits because of the receipt of workmen's compensation benefits, 42 U.S.C. (Supp. I) 424a. Since Congress made no such provision in the Longshoremen's and Harbor Workers' Act, it clearly was not intended.

the employee and the alternative economic resources available to the employee are not factors to be considered. Thus the courts have refused to modify an award where the employee's physi condition had not changed but his wages had been diminished as a result of depressed economic conditions because the purpose of a compensation award is "merely to compensate for decrease in earning capacity due to the injury." McCormick S.S. Co. v. United States Employees Co. Com., 64 F.2d 84, 86 (C.A. 9). Indeed, this Court long ago rejected the contention that an employee was not entitled to workmen's compensation for the period of temporary disability when his employer had continued to pay him the full salary. This Court stated in Hartford Accident and Indemnity Co. v. Hoage, 66 U.S. App. D.C. 163, 165, 85 F.2d 420, 422:

> The fact that [the employee] Cooley because of these circumstances may receive $25.38 per week, a sum in excess of his former wages, does not add to the liability of the insurance carrier who is called upon to contribute only the sum of $6.15 a week, being the sum established as the decrease of earning capacity of Cooley as defined by the statute. Accordingly, the apparently excessive sum which Cooley may receive because of the payment of his former wages by his employers imposes no increased burden upon the carrier. The converse of this situation appears in cases where the injured employee entirely discontinued work, although sustaining but a partial injury. In such cases the insurance carrier is held to contribute only the decrease in the wage-earning capacity of the injured employee and no more. In both illustrations the injury is compensable and the carrier is compelled to pay only the decrease in the working capacity of the employee regardless of whether during the period he earns as much as his former wages, or earns nothing whatever.

More recently, this Court rejected the contention that "the fact that a wealthy employer pays the [Workmen's Compensation] claimant $80 per week for light work as a gardener is irrelevant to establish a change of conditions within the meaning of section 922 of the Act." Pistorio v. Einbinder, 122 U.S. App. D.C. 39, 42, 351 F.2d 204, 207. The Court there made it clear that " 'mistake' or 'change in conditions' are still the predicates for the entry of a new compensation order, Congress has spelled out no other grounds." 122 U.S. App. D.C. at 42, 351 F.2d at 207. See also Serpas v. W. Horace Williams Co., 160 F.Supp. 850, 853 (E.D. La.), affirmed 261 F.2d 857 (C.A. 5).

And applying this same reasoning, the court in Todd Shipyards Corporation v. Landy, 239 F.Supp. 679 (N.D. Cal., 1963), rejected a contention that an employee who was receiving state unemployment insurance benefits as well as workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act was receiving a prohibited "double recovery". The court stated that even if there were a "double recovery", the recovery was not illegal since "no showing has been made that Congress intended the Longshoremen's and Harbor Workers' Compensation Act to be read in conjunction with state unemployment acts." (239 F.Supp. at 680).

With respect to other workmen's compensation statutes, the courts have specifically held that where, as here, the statute does not expressly preclude payment of both pension and compensation benefits, the employee is entitled to receive both. See e.g., Pisapia v. Newark, 47 N.J. Super. 353 A.2d 67, 72-74 (1957), where the employee retired on a pension while the workmen's compensation proceeding was pending, and the employee was held entitled to both a pension and compensation; Montgomery County v. Kaponin, 237 Md. 112, 205 A.2d 292 (1964), holding that a retired disabled police officer was entitled to receive both retirement benefits from the County and workmen's compensation benefits; Southwestern Bell Telephone Company v. Siegler, 240 Ark. 132, 398 S.W. 2d 531 (1966), where payments made under a "Plan for Employees Pensions, Disability Benefits and Death Benefits" were held not to constitute an advance payment of workmen's compensation; and Vanino v. Textile Machine Works, 183 Pa. Super. 181, 130 A.2d 203 (1957), holding that the employer was not entitled to a credit on the compensation award for the benefits paid by the employees' benefit association to which the employer contributed $2.75 per month, and the employee contributed only $1.10 because "[t]he weekly benefits made by the benefits association are not payments made by the employer as compensation out of its own funds or funds provided by it alone" (130 A.2d at 206).

In terminating the employee's compensation benefits as of the date of the enployee's retirement and his receipt of a pension under the contributory pension plan (J.A. 27), the district court relied on Larson's Workmen's Compensation Law (1961 ed.) §97 and §97.10 (JA. 26-27). This reliance was entirely misplaced. While noting that the various problems of workmen's compensation law should be coordinated with the total scheme of social legislation of which workmen's compensation is only one part, and that as a general matter an employee should not receive benefits from various sources, Larson nevertheless goes on to state that "As to private pensions, whether provided by the employee, union or the individual's own purchase, there is obviously no occasion for reduction of compensation benefits." Larson, supra, §97.33 at p. 495. Larson does express the opinion that the correct result is reached in those cases where the courts have refused the payment of both workmen's compensation and pension benefits where the statute or the pension agreement expressly provides that there should be no duplication of benefits. Larson, supra, §97.33 at 496. However, neither the Longshoremen's and Harbor Workers' Act, nor the pension agreement (as far as the record in this case reveals) provides that there should be no

duplication of benefits.[6/]

The district court in this case also seemed to rely upon the so-called "collateral source" rule applicable to damage awards in tort actions, pointing out that the employer should not have to pay twice but that if the employee "received an income from an outside, unrelated source," then this would not affect his compensation benefits. (J.A. 26). In calculating damages in tort cases, where "the plaintiff receives from the tortfeasor payments specifically to compensate him for his injury, the tortfeasor need not pay twice for the same damage. Therefore, such compensation payments should be taken into account in fixing tort damages" [but] "where the injured plaintiff's compensation comes from a collateral source, it should not be offset against the sum awarded for the tort nor considered in determining that award." United States v. Price, 288 F.2d 448, 449 (C.A. 4). Furthermore, the benefits may come

---

6/ In fact, as we later show, infra, p. 21 , if the employer had raised the question in the administrative proceeding, the employee would have had an opportunity to introduce in evidence the pension plan itself, which expressly provides that the retirement benefits shall be "in addition to * * * any benefits received under workmen's compensation."

from the same party but still be considered as coming from a "collateral source". Thus in United States v. Price, 288 F.2d 448, 449 (C.A. 4), a suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), the United States was held not entitled to a set-off in the computation of damages for the benefits the employee would receive under the Civil Service Retirement Act. The court reasoned (288 F.2d at 450):

> * * * the [Civil Service Retirement] Act establishes a comprehensive program for the retirement of government employees, and is not designed to compensate them for particular injuries suffered. The payments are retirement benefits, payable because of age or disability, and from a special fund derived in large measure from the contributions of the employees. Such benefits are obviously not mere gratuities to injured persons paid on account of their injuries. Rather, the Government in its role of employer has, like many other employers today, set up a retirement plan under which both the employees and the employer contribute. The retirement payments are entirely separate from the Government's acknowledged statutory duty as tort-feasor to pay any injured person for particular injuries resulting from negligence imputed to it. The two types of payments come from different sources, since tort payments are made from general revenues, while retirement benefits, on the other hand, are from the fund created in part by the employees themselves.

To the same effect, see Jennings v. United States, 291 F.2d 880, 887-888 (C.A. 4). See also, United States v. Harue Hayashi, 282 F.2d 559, 603-604 (C.A. 9).

This very same reasoning is applicable to the instant case. The pension plan was a contributory pension system maintained by the employer and contributed to by both the employer and the employee (J.A. 25, 19). It was not intended as a method to help the employer escape compensation liability but as a method of assuring that the employee should have an adequate source of income upon which to retire. And the sum received by the employee from the pension scheme is from a completely different source than the funds set aside for workmen's compensation. This employee had worked for more than 40 years for the D. C. Transit Co. and its predecessors and had contributed to the pension fund. He became eligible to retire at the age of 62, retired, and received an award of $236 a month. If he had not been injured, he might well have elected to stay with the company until the age of 65, which he could do under the pension plan, earning $110 a week. Or if he had retired and not been rendered totally disabled for the period of time found by the Deputy Commissioner, he could very well have collected his pension and obtained employment with another employer, as do many able retired pensioners, to supplement his retirement income. The receipt of both the pension and workmen's compensation benefits are plainly not a double recovery in this case, since he had contributed to the pension fund and he was effectively precluded from working for this employer or any other employer. Indeed, as a result of the district court's

decision, he received less per month by retiring ($236 a month) (J.A. 25) than he would have received had he not retired and continued to receive the temporary total disability award ($70 per week) (J.A. 24).

II

THE DISTRICT COURT ERRED IN DIRECTING THAT THE EMPLOYEE'S COMPENSATION AWARD BE MODIFIED ON A GROUND THE COURT RAISED SUA SPONTE AND NOT RAISED BY THE EMPLOYER AT THE ADMINISTRATIVE PROCEEDING OR IN THE DISTRICT COURT.

As we have shown above, the district court plainly erred in terminating an employee's compensation award under the Longshoremen's and Harbor Workers' Compensation Act because the employee received an allowance from a contributory pension fund. However, if it be assumed, arguendo, that as a general matter, benefits under the Longshoremen's and Harbor Workers' Compensation Act should cease when an employee becomes entitled to retirement benefits, the district court in this case plainly erred in even considering the question.

Here, as in Britton v. Great American Indemnity Co., 110 U.S. App.D.C. 190, 290 F.2d 381, certiorari denied 368 U.S. 900, the district court reversed the Deputy Commissioner's finding by raising an issue sua sponte that had not been presented to the Deputy Commissioner or even formally to the district court.

In reversing the district court's order in Britton, this Court, relying on settled law, made it clear that an issue which was not raised before the administrative agency cannot be seized upon for the first time in the reviewing court as a basis for upsetting the administrative determination. See e.g., United States v. Tucker Truck Lines, 344 U.S. 33, 37; Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492; Maryland Casualty Co. v. Cardillo, 71 U.S. App. D.C. 160, 107 F.2d 959; Metropolitan Casualty Ins. Co. v. Hoage, 67 U.S. App. D.C. 54, 89 F.2d 798.

The record is clear that no question relating to retirement benefits was before the Deputy Commissioner. The only question before the Deputy Commissioner (J.A. 11) as well as before the district court (J.A. 16) was whether there was a causal connection between the employee's mental condition existing after July 5, 1964, and the accident. In an attempt to prove that there was no causal connection, counsel for the employer asserted that the employee's mental condition was caused by "compensationitis, if there is such a term" and pointed out this claimant was receiving an allowance from the contributory pension system's provision for early retirement as well as Social Security benefits (J.A. 17). The district court wondered aloud whether it was fair that the employee receive "both continuing compensation for a neurosis plus his retirement benefits" (J.A. 20). The court then went on to rule in its

opinion that the employee was not entitled to both, without the employee ever having the opportunity before the finder of facts to develop the facts.

Indeed, as pointed out by this Court in Britton, supra, 290 F.2d at 382, one of the reasons for the rule requiring that an issue first be raised in the administrative proceedings is to enable the parties to offer all the evidence they believe relevant to the issue which the trier of fact is designated to decide. In this case, there was critical evidence, the D. C. Transit System, Inc. Employee's Retirement Trust Agreement and Plan, which could have been admitted into evidence if the issue had been raised. This agreement specifically provides for a separately funded trust with contributions by each employee of 4 1/2 percent of his weekly salary and contributions by the company of a sum equal to twice the aggregate amount of the employees' contributions. (Section 7(a)(b)). And contrary to the conclusion of the district court, the agreement expressly provides (Section 9(b)):

> Allowances are in addition to any other income which an employee may have, especially in addition to any benefits provided under the Social Security Act, and any benefits received under workmen's compensation.

In light of the settled rule that a court may not overturn administrative action on a ground not raised at the administrative level, the district court's order

modifying the compensation award -- on a ground never raised before the Deputy Commissioner -- is plainly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

CARL EARDLEY,
Acting Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

JOHN C. ELDRIDGE,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JUNE 1967

INDEX TO JOINT APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1965

Dec. 22 Complaint, appearance, Exhibit A

* * * *

1966

Feb. 23 Answer of defendant #1 to complaint; c/m 2/21/66; appearance David G. Bress and Ellen Lee Park

Apr. 18 Answer of defendant #2 to complaint; c/m 4/12/66; appearance of Frederick H. Livingstone

* * * *

Sep. 6 Motion of deft. #1 for summary judgment; P&A; statement; exhibit (Transcript Dept. of Labor 9-21-65); c/m 9-6-66;

Sep. 14 Motion of deft. #2 for summary judgment; P&A; c/m 9-9-66

Sep. 19 Opposition to pltff. to motion for summary judgment; cross-motion of pltff. for summary judgment

* * * *

Sep. 23 Opposition of pltff. to motion of deft. #2 for summary judgment; P&A; c/m 9-22-66.

Oct. 27 Cross-motions for summary judgment argued and taken under advisement (Rep.: G. Nevitt) Holtzoff, J.

Nov. 4 Memorandum opinion granting in part pltff.'s motion for summary judgment and denying defts.' motion for summary judgment Holtzoff, J.

1967

Jan.3 Order denying defendant's motion for summary judgment; granting in part plaintiff's motion for summary judgment and remanding cause to defendant Deputy Commissioner to modify Compensation Order by discontinuing award of disability benefits therein as of September 1, 1964 Holtzoff, J.

* * * *

Mar. 2 Notice of appeal by deft #1 from order of 1/2/67; copies mailed to R. W. Turner and W. S. Schantz and F. H. Livingstone

Mar. 3 Notice of appeal by deft #2 from order of 1/3/67; deposit $5.00 by Livingstone; copies mailed to Richard W. Turner and Ellen Lee Park.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D. C. TRANSIT SYSTEM, INC.,
a self insured corporation
3600 M Street, N. W.
Washington, D.C.

Plaintiff

vs.

Civil Action No.

3192-65

WILLIAM MASSEY, Deputy Commissioner
United States Employees' Compensation
Commission
Washington, D.C.

and

WILLIAM GUINN WHITE
11116 Markwood Drive
Silver Spring, Maryland

Defendants

BILL OF COMPLAINT FOR MANDATORY INJUNCTION UNDER A COMPENSATION AWARD

The bill of complaint of D. C. Transit System, Inc., through their attorneys, respectfully states:

1. That the jurisdiction of this court is based upon Title 36-501, District of Columbia Code, 1951 Ed., and upon 33 U.S.C.A. 921, the provisions of which allow a party aggrieved by an order of the United States Employees' Compensation Commission to appeal for review to the District Court of the United States for the District of Columbia.

2. That D. C. Transit System, Inc. is a self insured corporation doing business in the District of Columbia and brings this suit in its own right as self insuror and employer of the defendant, William Guinn White.

3. Defendant, William Massey, is Deputy Commissioner

of the United States Employees' Compensation Commission and is sued in his official capacity. Defendant William Guinn White, is a citizen of the United States and claims to be entitled to compensation benefits for permanent partial disability.

4. A copy of the award of the said William Massey is attached hereto as Exhibit "A" and by reference is made a part hereof.

5. That on July 19, 1963, William Guinn White, while performing services for the employer, sustained personal injuries.

6. That thereafter defendant, William Guinn White, made a claim for compensation under provisions of the Act of Congress approved May 17, 1928, entitled: "Longshoremen's and Harbor Workers' Compensation Act" (44 Stat. 1424, as amended 33 U.S.C. 901 et seq. as made applicable to the District of Columbia Code, 1951 Ed.). William Guinn White was paid compensation for temporary total disability for the period July 20, 1963 to July 31, 1964 for a total of $3,780.00, at which time all physical disability had ceased. For the period subsequent to July 31, 1964, the employee made claim for permanent total disability resulting from the accident of July 19, 1963. The employer challenged the claim for further disability on the ground that there was no causal connection between the mental disability then existing and the accident of July 19, 1963.

A hearing was held before the defendant, William Massey on September 21, 1965, at which time the testimony showed the employee to have sustained multiple contusions and abrasions

to the head, neck and lumbar spine and low back strain from all of which there had been recovery: That permanent total disability was claimed in the general field of a post-traumatic neurosis of psychoneurosis. The employee, whose normal retirement age would have been 65, had retired at age 62, effective September 1, 1964, under the D. C. Transit System, Inc. Employees Retirement plan on $236.00 per month, and in addition, was drawing Social Security of $121.00 per month. He had been under psychiatric care following an off-duty automobile accident in 1958 for "Involutional Depression", but that he had recovered and returned to work after nine weeks of treatment including electroshock therapy. He worked steadily until his accident of July 1963, following which he was again treated for Depression and never returned to work. His treatment again included electro shock treatment. The record shows that between 1958 and 1963 he had been prescribed librium, one of the tranquilizing drugs a had been examined for complaints of "overly exhausted, overly tir and the examining physician found "More than appropriate reaction and that this information was not given to his attending psychiat thus depriving him of some basis for his diagnosis. The attendin psychiatrist was aware only of the 1958 episode and the 1963 episode. Although the attending psychiatrist called the 1958 episode "Involutional Depression", he called the 1963 episode "Traumatic Depression Reaction". There was little to choose betw

the symptoms or the treatments of the two episodes. The employee testified falsely as to his ability to work around the house and to drive an automobile in addition to failing to give his attending psychiatrist information having an important bearing on a diagnosis. Motion pictures of the employee were shown and unrefuted testimony given to show his ability to work around his house and drive an automobile in addition to the admission into evidence of the Group Health records showing the treatment between 1958 and 1963. Two reputable psychiatrists testified that Involutional Depression was a condition of the ageing process and had no connection with trauma. There was no credible evidence before the Deputy Commissioner on which he could sustain his findings.

7. The plaintiff in the light of this order are without remedy, save through the interposition of this Court.

WHEREFORE, Plaintiff prays:

A. That process may issue from this Court against the defendants requiring them to appear and answer the exigencies of this complaint;

B. That the record of all the proceedings before the Deputy Commissioner, including the transcript of hearing and the compensation order of November 23, 1965, be certified to this Court for review;

C. That the compensation order of November 23, 1965 be vacated and set aside and that this Court enter a mandatory injunction permanently restraining defendant, William Guinn White, from receiving payment under said compensation order and directing defendant, William Massey, Deputy Commissioner to enter a new order rejecting the claim for compensation benefits for disability and medical expenses; and

D. That plaintiff be afforded such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

By _____
Richard W. Turner

and

_____
Wilmer S. Schantz, Jr.
Attorneys for Plaintiff
3600 M Street, N.W.
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act	
WILLIAM GUINN WHITE, Claimant	COMPENSATION ORDER
vs.	AWARD OF COMPENSATION
D. C. TRANSIT SYSTEM, INC., Employer and Self-Insurer	CASE NO. 152-1055

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on July 19, 1963, the claimant above named was in the employ of the employer above named, whose address is 3600 M Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was protected by the said employer's qualifying as a self-insurer;

2. That on the said day, the claimant, while performing services for the employer as a bus operator and while walking in the employer's garage, sustained injury resulting in his disability when he was struck and knocked down by a bus, as a consequence of which he suffered contusions and abrasions

to the head, neck and lumbar spine and low back strain, with resultant post-traumatic depressive reaction that the injury arose out of and in the course of the employment;

3. That written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

4. That the employer furnished the claimant with some medical treatment, hospitalization and care in accordance with the provisions of section 7 (a) of the Act; that as a result of the injury, the claimant required additional medical treatment and the employer is liable for the reasonable cost of all such additional medical treatment and care required by the claimant as a result of the injury;

5. That the average weekly wages of the claimant at the time of the injury were $111.10;

6. That as a result of the injury, the claimant has been wholly disabled since July 20, 1963, and that such temporary total disability is continuing; that for such temporary total disability the claimant is entitled to compensation at the maximum rate of $70 per week; that accrued compensation due the claimant for temporary total disability from July 20, 1963, to November 19, 1965, inclusive, 122 weeks at $70 per week amounts to $8,540;

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, D. C. Transit System, Inc., shall pay compensation to the claimant herein as follows: For temporary total disability, 122 weeks at the rate of $70 per week from July 20, 1963, to November 19, 1965, inclusive, in the amount of $8,540. The employer, having paid $3,780 to the claimant as compensation, is directed to pay forthwith $4,760 to the claimant, less attorney fees hereinafter provided, and to continue the payment of compensation to the claimant for temporary total disability from November 20, 1965, in biweekly installments of $70 per week during the continuance of said disability subject to the limitations of the Act or until further order of the Deputy Commissioner.

The employer shall also pay the reasonable cost of all medical treatment required by the claimant as a result of the injury and shall continue to furnish the claimant with such further medical treatment and care as the nature of the injury and the process of recovery therefrom may require.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Frederick H. Livingstone, Esq., in the amount of $900, such sum to constitute a lien upon and be paid out of this award.

Given under my hand and filed at Washington, D.C. this twenty-third day of November, 1965

Wm. Massey
Deputy Commissioner
District of Columbia Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, a self-insurer, and the attorney for the claimant at the last known address of each as follows:

NAME	ADDRESS
Mr. William Guinn White	11116 Markwood Drive Silver Spring, Maryland
D. C. Transit System, Inc.	3600 M Street, N.W. Washington, D.C.
Frederick H. Livingstone, Esq.	806 15th Street, N.W. Washington, D.C.

Wm. Massey
Deputy Commissioner

Mailed: November 23, 1965

* * * * *

THE DEPUTY COMMISSIONER: Mr. Turner, would you care to state the respondent's position at this point?

MR. TURNER: The position of the respondent is that there is no causal connection between the condition of Mr. White and his accident of July 19, 1963;

That any condition from which he does suffer is purely coincidental;

We also deny the extent of present disability.

THE DEPUTY COMMISSIONER: With respect to the medical expenses, in the event a finding is made in favor of the claimant will the employer assume the liability for the reasonable cost of medical expenses incurred by the claimant?

MR. TURNER: For reasonable medical expenses provided substantiation by physicians of our own choice is allowed from time to time at not unreasonable periods.

THE DEPUTY COMMISSIONER: I am thinking now is terms of the expenses already incurred.

MR. TURNER: Provided they can reasonably be connected with the present accident, yes.

CROSS EXAMINATION

BY MR. TURNER:

Q Mr. White, how old were you when you retired from the company, sir?

A [Mr. White] Sixty-two, I believe.

Q What is your normal retirement age?

A Sixty-five.

Q. Sixty-five.

How much do your receive in retirement, what is your monthly --

A It's $236-and some cents. I just can't recall, sir.

Q You also get Social Security?

A Yes.

Q How much is that per month?

A $121.

Q I believe your wife is retired also?

A Yes.

Q Where was she employed?

A She was employed with the government.

Q She has now retired from the government?

A Yes.

Q Does she get Social Security also?

A No.

Q Mr. White, you do work around your house, do you not?

A I do as much as I can do, small things.

Q Take care of your shrubbery?

A No. I can't go out like before. I used to do it all, cut the grass and all. I can get out, try to pull a few weeds and sit back down and try to help and clean the house a little bit.

Q Do you do such as carry the trash out, things of that nature?

A (Shaking head.)

Q A big trash barrel?

A I can't lift a trash barrel. I mean -- I'll carry the trash from the kitchen to the basement.

Q Do you still have your driver's permit?

A I had to turn my chauffeur's permit in.

Q Do you have a valid driver's permit?

A I do.

Q In the state of Maryland?

A I have a regular permit.

[19]

Q Yes.

Do you have a valid driver's permit in the District of Columbia?

A No.

Q Mr. White, did you not have a driver's permit in the District of Columbia number 2094650?

Isn't that your driver's permit?

A That expired. I think I never had it --

Q Renewed, January 11, 1963? It doesn't expire until January 11, 1966, does it?

A I guess not. I thought it had run out.

Q And you have Maryland permit number W300887293037. Isn't that your permit? You can check it if you wish.

You do have a Maryland permit, don't you? You don't have to check it.

A I mean I have the regular permit.

(The witness examining card case.)

This is 20902.

Q That's a Maryland operator's license.

A Yes.

Q Valid?

A Yes.

Q Mr. White, did you ever make any retirement plans with your wife and children?

A No, we never spoke of it. [20]

Q When did your wife retire?

A I believe it was '62 or '61.

Q But it was your intention to just continue working after that? You didn't plan any retirement with her?

A I mean I never -- in other words, it was never discussed. It was never thought of.

Q How much is her retirement, sir?

A $150 a month.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

D. C. TRANSIT SYSTEM, INC.,
Plaintiff
v.
WILLIAM MASSEY, ET AL.,
Defendants.

Civil Action 3192-65

Washington, D.C.
October 27, 1966.

The above cause came on for hearing of motions before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

Appearances:

For the Plaintiff:

RICHARD W. TURNER, ESQ.

For the Defendants:

GEORGE LILLY, ESQ.,
FREDERICK H. LIVINGSTONE, ESQ.

* * * * *

Does this obvious disability that the claimant had arise from the physical injury sustained on July 19, 1963, or is this simply a continuation of a mental condition first manifested in 1958?

THE COURT: In other words, the existence of the disability is not in controversy.

MR. TURNER: No, sir.

THE COURT: In other words, it is conceded that he is in a mental condition that prevents him from driving a bus.

MR. TURNER: Yes, Your Honor.

THE COURT: And the question is whether it is due to the physical injury?

MR. TURNER: Yes, sir.

THE COURT: That narrows the issue.

* * * * * [8]

MR. TURNER: Oh, yes, sir, but his accident occurred way down in the country somewhere.

In 1963 he did have an on-duty accident in which he sustained some physical injuries. He was treated for those injuries by several physicians, and it was stipulated at the time of the hearing before the Deputy Commissioner that he had no physical residual arising from this accident. He had been cured.

Following his on-duty accident in 1963 he was referred back to the same psychiatrist because of his history of psychiatric trouble and that time, instead of the diagnosis of continual involutional depression, we get a diagnosis of traumatic depressive reaction following trauma. But his symptoms were again depressed, agitated, insomnia, and it is stated right in the record there is no change from his previous pre-psychotic personality.

Is there any real difference here except a change of name brought on, I think, by compensationitis, if there is such a term as that, Your Honor. [9]

* * * * *

[10]

The hospital record showed a history of desire to retire with his wife when he was eligible. The man was 62 years of age and as such he would have been eligible for retirement under early retirement at D. C. Transit.

THE COURT: What is the retirement age for bus drivers?

MR. TURNER: The normal age is 65, sir, but at this time the man was 62 and there is a provision for early retirement.

If I may say so at this point, in fact the man did retire, he did take early retirement. He did go get social security and now he wants to add workmens compensation to that. His wife had retired in 1960.

When the reports of the testifying physician were written this record in the hospital was said to be incorrect, [11] that the physician who took that record had made a mistake. It is incredible that such a plain thing as that, as a desire to retire on the part of a man that they are examining for mental condition, is incorrect.

The claimant and his daughter both testified that he did not drive an automobile, but when I read off the numbers of his Maryland permit he admitted owning a valid Maryland permit to drive an automobile.

He denied that he worked around the house such as carrying trash receptacles. He denied specifically on certain days he did these things, and I showed motion pictures of him getting out of the automobile owned by a daughter right in front of the house. The motion pictures showed him carrying these things from the house to the street.

* * * * *

[12]

THE COURT: Mr. Turner, before you proceed I would like to ask you this. Perhaps it isn't too relevant. Does the D. C. Transit System have a pension system or are its retired employees just limited to their social security?

MR. TURNER: I'm sorry, I didn't understand. This thing is making so much noise.

THE COURT: Yes. We will wait.

(Pause.)

THE COURT: My question was, does the D. C. Transit System have a system of pensions for retired employees or are

the retired employees just limited to their social security?

MR. TURNER: Oh, we have a pension system, sir; a very fine one, I might add.

THE COURT: In other words, this gentleman is getting a pension over and above his social security? [13]

MR. TURNER: Oh, yes, sir.

THE COURT: Because social security is rather meager.

MR. TURNER: Oh, no, sir --

THE COURT: He gets a pension in addition.

MR. TURNER: Yes, sir. The hourly rated employees covered by the Transit Union provisions have an excellent pension plan. I believe even they would so describe it, sir. It is contributory, of course. They contribute a portion and the company contributes two and a half times as much, I believe is the figure.

THE COURT: So that this plaintiff is getting a pension now.

MR. TURNER: Yes, sir. He is now getting a pension from D. C. Transit System and he is also getting social security as soon as he was able.

* * * * *

[16]

THE COURT: I would like to ask you this, Mr. Lilly. He had reached the retirement age and he retired and he is

[17]
getting a pension. Doesn't it seem unfair that he should get both continuing compensation for a neurosis plus his retirement pension?

MR. LILLY: Your honor, I think if he is entitled to both, he earned his retirement --

THE COURT: But he is not working and he is getting paid, Why should he get double pay?

MR. LILLY: Because he was under the protection of the Workmens Compensation Act, which says that he is entitled to disability pay if as a result of his employment he is disabled. It is my understanding --

THE COURT: The purpose of workmens compensation is to compensate a person who is unable to work and loses pay as a result. A man who is retired and getting a pension is not losing any pay as a result of his disability because he wouldn't be working, anyway, even if he was one hundred percent well.

MR. LILLY: Well, Your Honor, I think in that connection I might have to defer to his representative because I think he was put into early retirement because of his injury.

THE COURT: He retired at 62, if I recall Mr. Turner's statement correctly. At 65 there would have been compulsory retirement. Has he reached the age of 65 now?

MR. LILLY: I imagine so, Your Honor.

[18]
THE COURT: In other words, the purpose of workmens compensation is not to compensate a person for pain and

suffering as it is in an ordinary personal injury action, but it is to compensate him for his inability to earn his living by his work. But he wouldn't be working, anyway, because he is retired and getting a pension.

MR. LILLY: Well, perhaps, Your Honor, we shouldn't say that a man who is 65 could not continue to work in some capacity even though --

THE COURT: Of course he can continue to work in some capacity, but the point is that he has retired.

Well, it may be that what I am saying does not bear on the legal rights of the parties, but it does seem to me to bear on the equities of the situation.

MR. LILLY: I might agree with that, Your Honor, but I do think they are separate situations and this man does come under the Act.

* * * * *

[CAPTION OMITTED]

OPINION

Richard W. Turner, of Washington, D.C., for the plaintiff.

David G. Bress, United States Attorney; Joseph M. Hannon and Ellen Lee Park, Assistant United States Attorneys; and George Lilly, Department of Labor, all of Washington, D.C., for the defendant Massey.

Frederick H. Livingstone, of Washington, D.C., for the defendant White.

This is an action under 33 U.S.C. §921, to review a Workmen's Compensation award made by a Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act. This statute constitutes the Workmen's Compensation Law for the District of Columbia, D.C. Code, 36-501. The action is brought by the employer, who challenges the award and is before the Court on cross-motions for summary judgment.

The defendant William G. White was a bus driver employed by the plaintiff, D. C. Transit System, Inc., which is self-insured under the Workmen's Compensation statute. He had been in the service of the company for 28 years. On July 19, 1963, he was injured in an accident in the course of his employment. The employer furnished him with medical treatment and hospital care, and paid weekly compensation to him voluntarily until he completely recovered from his physical injuries. He continued

to suffer, however, from a neurosis that completely disabled him from continuing to drive a bus and he no longer continued in his previous occupation. These facts are undisputed.

The controversy is over the question whether his neurosis was the result of the accident and, therefore, arose out of and in the course of employment. The Deputy Commissioner resolved this issue in favor of White. The employer contests the Deputy Commissioner's finding and conclusion on this point, and contends that the employee's neurosis had no connection either with the accident or with his employment.

The evidence in support of the claim on this issue was far from satisfactory, especially because the claimant's credibility was seriously impeached. The scope of judicial review, however, in cases such as this is restricted and limited. The Court may not review the evidence and reach an independent conclusion as though the review is a trial de novo. So, too, the Court may not review the weight of evidence and set aside the findings of fact of the Deputy Commissioner, if it deems them to be contrary to the weight of evidence. The function of the Court is limited to determining whether there is substantial evidence to sustain the findings. While substantial evidence is more than a scintilla, it does not mean that the Court may set aside the findings if it deems the weight of evidence to be the other way. In connection with determining whether there is substantial evidence to sustain the findings, the Court may not determine the credibility of witnesses. This function is reposed in the trier of the facts, in this instance, the Deputy Commissioner.

In the light of these principles of law, the salient features of the evidence may be summarized as follows. As heretofore stated, White was injured in the course of employment on July 19, 1963. Payments were made to him by the employer from July 20, 1963 to July 31, 1964, on the basis of temporary total disability, at the rate of $70 a week, in the aggregate sum of $3780. The average weekly wages of the employee amounted to $111.10. The employer discontinued further payments on the admitted ground that the employee had fully recovered from his physical injuries. He, however, developed a neurosis that prevented him from resuming his occupation and made him unable to drive a bus.

The psychiatrist, who had been treating him, Dr. Andred, diagnosed his ailment as "a traumatic depressive reaction following trauma", and expressed the opinion that the accident was a reasonable probable cause of his condition. It was disclosed, however, that back in 1958, White had been in another accident not connected with his employment, which was followed by a neurosis that required a number of electric shock treatments. Dr. Andred disagnosed that condition as "involutional depression involving some paranoid trends", and expressed the view that his patient had fully recovered. According to Dr. Andred there was a clear difference between White's 1958 affliction and his 1963 ailment, and there was no connection between the two. Admittedly White resumed his occupation as a bus driver and continued in it until the accident of July 19, 1963.

On the other hand, two psychiatrists, Dr. Hyman Shapiro, and Dr. Leon Yochelson, who examined the claimant at length in the employer's behalf, were of the opinion that the claimant was suffering from "an involutional depression", rather than "a post traumatic depression", and that his 1963 illness was not connected with the accident of July 19, 1963, but that the occurrence of the accident was a mere coincidence with the onset of the sickness. According to Dr. Shapiro it was the same ailment as that from which the claimant had suffered in 1958. He also pointed out that the claimant was treated for the symptoms of involutional depression in March 1963, four months before the accident. Dr. Yochelson expressed the view that White's condition was related to a "change of life".

It is immaterial what conclusion this Court would have reached if its function were to consider the evidence de novo. The Court is constrained to the conclusion that there was substantial evidence to sustain the findings of the Deputy Commissioner. He had the right to accept the opinions of Dr. Andred, if he chose to do so. This result, however, does not dispose of the case, in the light of the unusual features about to be discussed.

Counsel for the employer introduced evidence to the effect that the claimant retired on September 1, 1964 at the age of 62, and since that time has been receiving the sum of $236 a month as a retirement annuity under the contributory pension system maintained by the employer.[1/] To be required to pay Workmen's

---

1/ In addition, the claimant is receiving Social Security payments at the rate of $121.00 a month.

Compensation in addition to the pension is to exact double payments from the employer. It is necessary in this connection to bear in mind the basic theory on which the Workmen's Compensation system is based and its underlying philosophy. Workmen's Compensation is not analogous to the payment of a judgment for damages in a tort action. No award is made for pain and suffering or mental anguish, or for the disability as such. Workmen's Compensation is not based on fault. It is a reimbursement to the injured workman for the earnings that he loses as a result of his injuries, if he is injured in the course of his employment. It is a pecuniary economic recompense for loss of wages and nothing else, and is one of the expenses of the industry. An injured workman, who some time after he is injured, retires and receives a pension under a system maintained by his employer no longer loses any wages. He is out of the industrial ranks for the rest of his life. His financial requirements are taken care of by the pension. It follows hence that to allow Workmen's Compensation over and above his pension, in effect, constitutes double payment. The situation would be entirely different if the workman received an income from an outside, unrelated source, whether by way of insurance maintained by himself or as a gift or gratuity from someone.

But is in place of it.

why?

This doctrine is developed and approved in the leading treatise on this subject, Larson's Workmen's Compensation Law,

§§97 and 97.10, pp. 488 and 489:

> "Once it is recognized that workmen's compensation is one unit in an over-all system of wage-loss protection, rather than something resembling a recovery in tort or on a private accident policy, the conclusion follows that duplication of benefits from different parts of the system should not ordinarily be allowed.
>
> * * * *
>
> "Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wageslost due to the three major causes of wage loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage loss benefit. This conclusion is inevitable, once it is recognized that workmen's compensation, unemployment compensation, non-occupational sickness and disability insurance, and old age and survivors' insurance are all part of a system based upon a common principle."

The Court concludes that on this basis the compensation awarded to the claimant should be discontinued as of September 1, 1964, - the date of his retirement, - and that the award should be modified accordingly.

The plaintiff's motion for summary judgment is granted in part as indicated in this opinion.

The defendant's motion for summary judgment is denied.

Alexander Holtzoff
United States District Judge

November 4, 1966.

[CAPTION OMITTED]

ORDER

Upon consideration of the motions for summary judgment filed herein by defendants and the cross motion for summary judgment filed by plaintiff, the memoranda of points and authorities in support thereof, oral argument of counsel, and for the reasons indicated in the opinion of this Court filed in the above entitled cause on November 4, 1966, it is this 3d day of Jan., 1967

ORDERED that defendants' motions for summary judgment be and the same hereby are denied, and that plaintiff's motion for summary judgment be and the same hereby is granted in part, and the cause is hereby remanded to the defendant deputy commissioner to modify the compensation order here under review by discontinuing the award of disability benefits therein as of September 1, 1964.

/s/ Alexander Holtzoff
DISTRICT JUDGE

[CAPTION OMITTED]

NOTICE OF APPEAL

Defendant William Massey, Deputy Commissioner, Bureau of Employees' Compensation, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment entered in this action on January 3, 1967.

/s/ DAVID G. BRESS
DAVID G. BRESS,
United States Attorney.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been mailed to attorneys for plaintiff, Richard W. Turner, Esq., and Wilmer S. Schantz, Esq., 3600 M Street, N.W., Washington, D.C. 20007, and to attorney for defendant, William Guinn White, who is Frederick H. Livingstone, 837 Shoreham Building, 806-15th Street, N.W., Washington, D. C. 20005, this 2nd day of March, 1967.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney

BRIEF FOR THE APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 14,098

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Appellant,

v.

D. C. TRANSIT SYSTEM, INC., a self-insured corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD W. TURNER
WILMER S. SCHANTZ, JR.,
3600 M Street, N.W.
Washington, D. C. 20007

Attorneys for Appellee

Washington, D. C. — TYNELL PRESS - 202 - 393-0525

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court erred in modifying an employee's workmen's compensation award under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 901 et seq., on the ground that the employee had, by retirement, removed himself from the labor market and would be exacting double payments from the employer.

2. Whether the District Court erred in directing that the employee's compensation award should be reduced on a ground developed in the course of the administrative proceeding, but not raised as an issue at the administrative proceedings.

INDEX

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Appellant,

v.

D. C. TRANSIT SYSTEM, INC., a self-insured corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

SUMMARY OF ARGUMENT

1. The District Court did not err in directing the modification of the award under the circumstances of the case. 33 U.S.C. 922 sets out how awards may be modified by the Deputy Commissioner, but is not a limiting of the powers and duties of a United States District Court Judge. This award was modified under 33 U.S.C. 921,

a pertinent part of which states: "If not in accordance with law, a compensation order may be suspended or set aside in whole or in part . . .". The trial court in this instance, sua sponte, recognized the essential fact that the employee had no wage-earning capacity as a bus operator after his retirement and the employer would be paying twice even though the employee had contributed to the pension plan.

2. There was no failure to present critical evidence, either before the Deputy Commissioner or the court. The employer is not now modifying, nor has it attempted to modify in any way its plan. The retirement benefits have been and will continue to be paid to the employee. The employee had a right to early retirement at age 62 and he would be forced to retire at age 65. "The Compensation system, unlike a tort recovery, does not pretend to restore to any claimant what he has lost. It gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others." Larsen's *Workmen's Compensation* 2.50.

ARGUMENT

I

An Employee's Receipt of Retirement Benefits Under a Contributory Pension System Furnishes Ground for Modifying His Award Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 Et Seq.

The purpose of a compensation award is "merely to compensate for decrease in earning capacity due to the injury". *McCormick Steamship Company v. United States Employees Compensation Commission*, 64 F.2d 684. It would be unjust and inequitable to the public to allow in this instance the employee to collect Social Security $121.00 per month, J.A. 12, company pension $236.00 per month, J.A. 12, and also Workmen's Compensation $70.00 a week. The trial court, sua sponte, recognized the essential fact that the employee had no wage-earning capacity as a bus operator after his retirement. Workmen's Compensation is a burden paid for entirely by industry, the theory being that these costs are to be passed on to that special segment of the public using the goods or services produced by the particular industry. No employee makes any contribution to such costs. It is one part of our great social legislation designed to alleviate the financial hardship of occupational injury. It has never been and should not now be considered a means of financial enrichment. The reason for this statement is obvious. How many of us would work if our net pay, without working, was equal to or better than our pay while working.

> "The law is founded upon the principle of insurance and is in no sense a pension or bounty or gratuity. On the other hand, it was never intended by the most ar-

> dent advocates of workmen's compensation to give full renumeration for loss of wages, because this would remove much of the inducement of working men to exercise care and caution on their own part and would be an inducement to malinger".

State exrel. Crawford v. The Industrial Commission, 110 Ohio St. 271, 143 N.E. 574.

> "It was not the purpose of the legislature to place a premium upon idleness or slothfulness, but to assure to the industrious worker and to his dependents a reasonable support and maintenance during the period of enforced idleness resulting from industrial accidents which destroy or impair earning capacity".

Sheldon Lead & Zinc Company v. State Industrial Commission, 100 Okla. 188, 229 P. 255.

In Mizrahi's Case, 71 N.E. 2d 383, the Massachusetts Court said:

> "All compensation acts rest upon the policy that the industry should bear the burden of industrial accidents. but there is no policy that justifies placing the burden upon the industry twice that . . ."

Although *Larson* in Sec. 97.31, in discussing Social Security benefits combined with workmen's compensation, says they can hardly be attacked as excessive, he completely contradicts this in the 1964 Supplement and cites as an example:

> "A man making $200 a month with a wife and two children, if totally disabled at age 50 or over, by an industrial accident might draw $161.60 under the disability provisions of the Social Security Act and $140.00 a month under a Workmen's Compensation Act. This

would give him a total of over $300.00 a month while not working."

II

The District Court Did Not Err in Directing That the Employee's Compensation Award Be Modified Where the Court Recognizes Manifest Injustice Which Could Not Have Been Corrected by Administrative Procedure.

There was no failure to present critical evidence, either before the Deputy Commissioner or the court. The employer is not now modifying, nor has it attempted to modify in any way its plan. Here we are dealing with an issue which was before the Deputy Commissioner, but which was beyond his authority to decide. It was not until this matter came before the District Court that this issue of law could be resolved. There were no further relevant facts which could have been developed on this issue at the administrative hearing. The retirement benefits have been and will continue to be paid to the employee. The employee had a right to early retirement at age 62 and would have been forced to retire at age 65. The District Court, by its order in this case, did not terminate the award of the Deputy Commissioner. J.A. 28. Plaintiff's motion for summary judgment was granted only in part with instructions to the Deputy Commissioner to modify the order only by discontinuing the award of disability benefits. The employer is still required to "pay the reasonable cost of all medical treatment required by the claimant as a result of the injury and shall continue to furnish the claimant with such medical treatment and care as the nature of the injury and the process of recovery therefrom may require". J.A. 9.

At the time of passage by Congress of the Longshoremen's and Harbor Worker's Act, March 4, 1927, there was no such thing as So-

cial Security and very few private pension plans in existence. It is entirely within the spirit of the Act to prevent unjust enrichment. Some states have enacted legislation which would automatically reduce the amount of pension by the amount of any Workmen's Compensation benefit. N.Y.C.S. law Sec. 67. It is to be noted that some courts have found duplication of benefits so abhorrent that they have arrived at an avoidance of such duplication initially by construing a private pension plan as inoperative while compensation benefits are being received. *Bromberg v. United Cigar Whelan Stores Corporation.* (Supreme Court of New York County) 124 New York Law Journal 687 (1951).

> "Substantial weight should be given to New York decisions in construing the Longshoremen's and Harbor Worker's Act, since that act was modelled after New York's Compensation Act".

Case of Pillsbury 48 F.2d 392 (Cal.-CCA 1945) *Iacone v. Cardillo*, 208 F.2d 696 (N.Y. CCA 1954).

The State of New Jersey Workmen's Compensation law has a provision which says that no former employee who has been retired on pension by reason of injury or disability shall be entitled to workmen's compensation for such injury or disability. In the case of *Dennis Pirher v. The Board of Public Works of South River*, 35 N.J. Super 193, 117 A.2d 615, the employee sustained a compensable injury resulting eventually in the amputation of a leg. He was paid his full wages for some time and then applied for retirement under the disability statute, which was granted. Before the Workmen's Compensation Board could rule on the matter the objection was made that his retirement made him a "former employee" within the meaning of the State Workmen's Compensation statute and the Court agreed that he was, holding that he was not entitled to pension and workmen's compensation. An example of the reluct-

ance of courts to have an employer pay twice is the case of *McCabe Inspection Service, Inc., et al v. John A. Willard, et al,* 240 F.2d 942. In this case the employer paid full wages during the period of temporary total disability and later when an award of permanent partial disability was made, the Court held that the amounts paid over and above the compensation rate by the employer must be credited in computing the compensation due under the award. This was true even though the employer made the payments voluntarily before knowledge of any permanency and without labelling them advance payments under the Act. In the case of *City of Los Angeles v. Industrial Accident Commission,* 404 P.2d 801, the employee collecting a pension under the Los Angeles Fire and Police Pension Fund also sought workmen's compensation under the California law. The law allows payment under one plan to be credited against payments under the other. The Court found that a 6% deduction from the employee's base salary put into the pension fund was a contribution of the employee under the compensation statutes. It, therefore, held that since it would be illegal to require the employee to contribute towards workmen's compensation insurance, only a percentage of the pension payments equivalent to the employer's contributions could be credited against the workmen's compensation payments.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

Richard W. Turner
Wilmer S. Schantz, Jr.
3600 M Street, N.W.
Washington, D. C. 20007
Attorneys for Appellee

REPLY BRIEF FOR THE APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Appellant,

v.

D. C. TRANSIT SYSTEM, INC., a self-insured corporation,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL EARDLEY,
Acting Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

JOHN C. ELDRIDGE,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

C I T A T I O N S

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Appellant

v.

D. C. TRANSIT SYSTEM, INC., a self-insured corporation,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

Appellee seeks to sustain the district court's termination of the award of compensation benefits under the Longshoremen's and Harbor Workers' Act on the ground that the employee was already receiving a retirement annuity--paid for in part by the employee himself--by relying on cases in state courts where the courts have refused the payment of both workmen's compensation and pension benefits (Brief, pp. 6-7). However, in all of

these cases the pertinent statute or the pension agreement expressly provides that there should be no duplication of benefits. On the other hand, as demonstrated in our opening brief, neither the Longshoremen's and Harbor Workers' Act nor the pension agreement in this case provides that there should be no duplication of benefits.

Thus where courts in New Jersey, New York or California have held that state or municipal employees are not entitled to receive both compensation benefits as well as pensions arising from retirement or death, the statute has expressly so provided. See N.J.S.A. 34-15-43 (1966 Supp.); McKinney's New York Workmen's Compensation Law §30; Charter of the City of Los Angeles, Section 182½ reproduced in City of Los Angeles v. Industrial Accident Commission, 63 C.2d 424, fn. 3, 404 P.2d 801, 46 Cal. Rept. 97, fn. 4 at 99. Indeed in City of Los Angeles, supra, the California Supreme Court en banc held that even where a statute provided that a pension award should be reduced by the amount of compensation received, the city as employer was entitled to no more than a partial credit against its workmen's compensation liability commensurate with the proportion of its tax payments to the fund in the situation where the employees have contributed to a pension fund from their salaries over the years.

Moreover, while appellee is correct in asserting that judicial interpretation of the New York statute merits particular attention in interpreting the Longshoremen's and Harbor Workers' Compensation Act since the federal statute is based upon the New York Workmen's Compensation Law (Brief, p. 6), this is limited to decisions interpreting the New York law as it was at the time of enactment. But judicial decisions construing an amendment to the New York statute are obviously not in point in construing the Longshoremen's and Harbor Workers' Act in situations where the latter Act contains no provision similar to the New York amendment. In this connection, it is noteworthy that at the time of the adoption of the Longshoremen's and Harbor Workers' Act, enacted March 4, 1927, and effective July 1, 1927, 44 Stat. 1424, 1446, the New York Workmen's Compensation Law expressly provided that "No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter." Laws 1922,

chapter 415 §30. [1/] In construing this provision, the New York Supreme Court held that an employee was entitled to both an award of compensation and a pension, even though the total amount "resulted in his receiving a greater amount per week than he actually earned while working," noting that "the claimant had contributed 3 per cent of his salary to the fund from which he is now being paid this pension."

1/ Birdseye, Cumming & Gilbert's Consolidated Laws of New York, Vol. 13, 2d ed., Cumulative Supplement, 1921 to 1923, Vol. 2. Section 30 then read in its entirety:

§ 30. Revenues or benefits from other sources not to affect compensation.

No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system which is not sustained in whole or in part by the contributions of the employee, may be applied toward the payment of the death benefit provided by this chapter.

Svec v. City of New York, 251 App. Div. 758, 295 N.Y.S. 393, 394.[2/]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our main brief, the judgment of the district court should be reversed.

CARL EARDLEY,
Acting Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

JOHN C. ELDRIDGE,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

AUGUST 1967.

2/ Mizrahi's Case, 370 Mass. 733, 71 N.E.2d 383, cited by appellee at p. 4 of its brief, is not in point, for there, the Massachusetts Supreme Judicial Court merely held that an employee could not recover compensation under both the state and federal statutes. However, that court did point out that a provision in the Massachusetts Workmen's Compensation Law enacted in 1911 was "designed to make sure that the employee would not lose the full advantage of any savings or insurance of his own and of any sick benefits or other benefits to which he might be entitled from such sources as fraternal orders, benefit associations, pension plans, governmental or otherwise, and the like. In that field, it should be broadly construed." 320 Mass. at 737, 71 N.E. 2d at 385, (emphasis added).

BRIEF FOR AMICUS CURIAE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,902

WILLIAM GUINN WHITE — **Appellant,**

vs.

D. C. TRANSIT SYSTEM, INC. — **Appellee.**

No. 20,898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor — **Appellant,**

vs.

D. C. TRANSIT SYSTEM, INC.,
a self-insured corporation — **Appellee.**

Appeal from the United States District Court
For the District of Columbia

JOSEPH H. KOONZ, JR.
LEE C. ASHCRAFT
MARTIN E. GEREL

Ashcraft and Gerel
925 - 15th Street, N. W.
Washington, D. C. 20005
Attorneys for Amicus Curiae

Division 689 of the Amalgamated
Association of Street, Electric
Railway and Motor Coach Employees
of America, AFL-CIO

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Trial Court erred in deciding that an employee was not entitled to workmen's compensation benefits while he was receiving retirement benefits under a contributory pension system, agreed to by the employee's union and his employer, which specifically stated that retirement benefits were separate and apart from workmen's compensation benefits.

2. Whether the Trial Court properly considered, *sua sponte*, an issue not raised before the Deputy Commissioner.

3. Whether a Motion for Summary Judgment filed by a self-insured employer in an action to set aside an award of workmen's compensation benefits was properly granted when a factual issue concerning an agreement between the employer and the employee's union existed.

INDEX

TABLE OF CASES

STATUTES AND REGULATIONS

TREATISE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,902

WILLIAM GUINN WHITE — **Appellant,**

vs.

D. C. TRANSIT SYSTEM, INC. — **Appellee.**

No. 20,898

WILLIAM MASSEY, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor — **Appellant,**

vs.

D. C. TRANSIT SYSTEM, INC.,
a self-insured corporation — **Appellee.**

Appeal from the United States District Court
For the District of Columbia

BRIEF FOR AMICUS CURIAE

JURISDICTIONAL STATEMENT

This is an action brought by a self-insured employer against a Deputy Commissioner, of the Bureau of Employees' Compensation,

United States Department of Labor, to set aside an award of workmen's compensation benefits. The United States District Court for the District of Columbia took jurisdiction of this case pursuant to 33 U.S.C. 921(b). After cross Motions for Summary Judgment were filed, the Trial Court remanded the case to the Deputy Commissioner. A notice of appeal was filed by the Deputy Commissioner and the injured employee. After the appeals were docketed, Division 689 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, was given consent by the parties to file an *amicus curiae* brief. This Court has jurisdiction over this appeal under Title 28, U.S.C., Section 1291.

STATEMENT OF CASE

Amicus Curiae, Division 689 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter referred to as "union") adopts the Statement of the Case set forth by the appellant William Massey, Deputy Commissioner.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, are as follows:

33 U.S.C. 908 provides:

* * *

> (b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

33 U.S.C. 921. Review of Compensation orders

* * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

33 U.S.C. 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation, previously paid, except that an award increasing the compensation

> rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by the approval of the Secretary.

SUMMARY OF ARGUMENT

At the time of the formal hearing before the appellant Deputy Commissioner the only issue presented was the nature and extent of the employee's disability as a result of an injury arising out of and in the course of his employment. It was on this issue that evidence was presented and an award entered. At no time during the formal hearing was the question of the alleged "double recovery" by the employee raised by the appellee. In fact, the complaint filed by the appellee to enjoin and set aside the compensation order made no mention of the legality of an employee receiving both workmen's compensation benefits and retirement benefits. The issue was not raised until the Trial Court, *sua sponte*, mentioned it during oral argument.

Since there was in effect at the time, and is today, an agreement between the appellee and the union specifically covering this very issue, the Trial Court erred in granting the appellee's Motion for Summary Judgment. The agreement, set forth in the Joint Appendix, contains the following clause:

> Section 9(d)
>
> > "Allowances [for retirement benefits] are in addition to any other income which an employee may have, especially in addition to any benefits provided under the Social Security Act, and any benefits received under *workmen's compensation.*"

The terms of this agreement are binding on the parties and inure to the benefit of the union members, *i.e.* Mr. White, an appellant and

an employee of the appellee, a beneficiary of the agreement. Thus the Trial Court erred in granting the Motion for Summary Judgment in favor of the appellee. A genuine issue of fact was presented to the Trial Court which could only have been resolved by recourse to the agreement itself. Had the agreement been presented and made part of the record below, it seems apparent the Trial Court would not and could not have arrived at the conclusion it did.

The Trial Court further erred in considering an issue not raised or presented to the Deputy Commissioner during the formal hearing, an administrative proceeding. The only consideration the Trial Court can give to a review of an order by a Deputy Commissioner is to determine whether there is in fact substantial evidence in the record to support the award. By going beyond this well-established principle the Trial Court committed additional reversible error.

ARGUMENT

I

THE AGREEMENT ENTERED INTO BETWEEN THE APPELLEE AND THE UNION SPECIFICALLY PROVIDED THAT THE APPELLANT EMPLOYEE COULD RECEIVE BOTH WORKMEN'S COMPENSATION AND RETIREMENT BENEFITS

It is well established that the terms of a collective bargaining agreement made by bargaining agents selected by a majority of the workers are binding on both the employer and the employee. One who benefits as the result of such collective agreements must accept not only its advantages but its limitations. *Britt* v. *Trailmobile*, 179 F.2d 569 (6th Cir. 1950). The Supreme Court in *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 322, stated that "an employee becomes entitled by virtue of the

Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement . . . ." The District of Columbia adopted this view in *Marranzano* v. *Riggs National Bank of Washington, D. C.*, 184 F.2d 349 (1950). There is also no requirement that such contract be signed or even seen by each individual employee. *Earle Restaurant* v. *O'Meara*, 160 F.2d 275, 82 U.S. App. D.C. 49 (1947); *Minor* v. *Washington Terminal Co.*, 180 F.2d 10, 86 U.S. App. D.C. 71 (1950).

In this case an Agreement was entered into between D. C. Transit System, Inc. and Division 689 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, effective November 1, 1962. The claimant was a member of such "local" and was, therefore, entitled to all the benefits of such Agreement. D. C. Transit System, Inc. accordingly is bound by the terms of such Agreement.

A Retirement Trust Agreement and Plan, a part of the whole agreement, provided for employee contributions of a 4-1/2% of his weekly salary and contributions by the employer of a sum equal to twice the aggregate amount of the employees' contributions. Section 9(d) of such Agreement specifically provided:

> "Allowances are in addition to any other income which an employe may have, especially in addition to any benefits provided under the Social Security Act, *and any benefits received under workmen's compensation.*" (emphasis added)

This provision of the Agreement between the appellee and the union was never brought to the attention of the Trial Court. This fact is understandable since this issue was not before the Deputy Commissioner for his consideration. Clearly under the terms of the Agreement the appellant employee is entitled to any benefits he may receive under the Workmen's Compensation Act in addition to the retirement pension.

There is no provision in the Longshoremen's and Harbor Workers' Compensation Act that payments will be terminated if the employee is also receiving a retirement pension, nor should any such provision be implied from any reading of the Act.

The Longshoremen's and Harbor Workers' Compensation Act contains no provision providing that compensation benefits shall terminate if the employee receives pension benefits.

The only statutory grounds for modification of an award of compensation are the termination of the disability or a mistake in an earlier determination of fact by the deputy commissioner, 33 U.S.C. 922. The District Court, therefore, added a ground for termination that does not appear in the Act. There is clearly no justification for such an interpretation.

The majority of courts that have dealt with this question have allowed the receipt of both benefits. In *Todd Shipyards Corp.*v. *Landy*, 239 F. Supp. 679 (N.D. Cal. 1965), the court allowed an employee to receive both unemployment compensation under the state statute and workmen's compensation. The court stated there was "no showing . . . that Congress intended the Longshoremen's and Harbor Workers' Compensation Act to be read in conjunction with state unemployment acts." (at page 680)

Larson in his treatise on workmen's compensation, *Larson's Workmen's Compensation Law* (1961 *ed.*), recognizes the problem of coordination between our social legislation programs; however, he states that in the absence of an express clause in the particular act before it the "burden of achieving this coordination should not be thrust upon the courts, since many detailed questions are certain to arise which *can only be handled by carefully-considered legislation.*" (emphasis added)

In *Pisapia* v. *Newark*, 47 N.J. Super. 353 A.2d 67, 72-74 (1957), the employee retired on a pension while the workmen's compensation proceeding was pending. The employee was held entitled to both a pension and compensation, the court stressed that any overlapping in these benefits should be up to the legislature to change.

It should be stressed that any problem in coordination between social legislation programs among various branches or levels of the government would not apply to private agreements. Any impropriety that may exist as to overlapping of government payments certainly disappears where private agreements are involved. This is especially true where both parties, as here, have contributed to the fund. Larson states:"As to private pensions, whether provided by the employee, union or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits." *Larson, supra,* §97.33 at page 495.

In *In re Shuler*, 255 N.C. 559, 122 S.E. 2d 393 (1961), an analogous situation was before the North Carolina Supreme Court. There the question was whether an employee's right to unemployment compensation under the state statute should be reduced by the amount he was being paid under an unemployment fund created by his employer. The Court held that there should be no reduction as the benefits were not a receipt of "wages" within the meaning of the Act. Here also the Court relied on the terms of the contract between the employer and the local union, which stated that such payments were not to be considered wages "for any purpose". The North Carolina Court also noted that where an Ohio court reached the opposite result the legislature immediately amended its law to allow both payments. See also: *Malloch* v. *Maine Employment Security Comm* ., 188 A.2d 892 (1963); *Southwestern Bell Telephone Company* v. *Siegler*, 240 Ark. 132, 393 S.W.2d 531 (1966);

Vaninon v. *Textile Machine Works*, 183 Pa. Super. 181, 130 A.2d 203 (1957).

The existence of the Agreement referred to above, together with the authorities cited, should lead but to the conclusion that a mistake has been made by the Trial Court. A reversal of the Trial Court's decision must necessarily follow to correct the error.

II

FAILURE TO RAISE THE ISSUE OF RETIREMENT VERSUS WORKMEN'S COMPENSATION BENEFITS AT THE ADMINISTRATIVE PROCEEDING PRECLUDED ITS CONSIDERATION BY THE TRIAL COURT

During the course of oral argument the following colloquy took place between the Court and counsel for the appellee:

> "THE COURT: Mr. Turner, before you proceed I would like to ask you this. Perhaps it isn't too relevant. Does the D. C. Transit System have a pension system or are its retired employees just limited to their social security?
>
> "MR. TURNER: I'm sorry, I didn't understand. This thing is making so much noise.
>
> "THE COURT: Yes. We will wait.
>
> "(Pause)
>
> "THE COURT: My question was, does the D. C. Transit System have a system of pensions for retired employees or are the retired employees just limited to their social security?

"MR. TURNER: Oh, we have a pension system, sir; a very fine one, I might add.

"THE COURT: In other words, this gentleman is getting a pension over and above his social security?

"MR. TURNER: Oh, yes, sir.

"THE COURT: Because social security is rather meager.

"MR. TURNER: Oh, no, sir —

"THE COURT: He gets a pension in addition.

"MR. TURNER: Yes, sir. The hourly rated employees covered by the Transit Union provisions have an excellent pension plan. I believe even they would so describe it, sir. It is contributory, of course. They contribute a portion and the company contributes two and a half times as much, I believe is the figure.

"THE COURT: So that this plaintiff is getting a pension now.

"MR. TURNER: Yes, sir. He is now getting a pension from D. C. Transit System and he is also getting social security as soon as he was able.

* * *

"THE COURT: I would like to ask you this, Mr. Lilly. He had reached the retirement age and he retired and he is getting a pension. Doesn't it seem unfair that he should get both continuing compensation for a neurosis plus his retirement pension.

"MR. LILLY: Your honor, I think if he is entitled to both, he earned his retirement —

"THE COURT: But he is not working and he is getting paid. Why should he get double pay?

"MR. LILLY: Because he was under the protection of the Workmen's Compensation Act, which says that he is entitled to disability pay if as a result of his employment he is disabled. It is my understanding —

"THE COURT: The purpose of workmen's compensation is to compensate a person who is unable to work and loses pay as a result. A man who is retired and getting a pension is not losing any pay as a result of his disability because he wouldn't be working, anyway, even if he was one hundred percent well.

"MR. LILLY: Well, Your Honor, I think in that connection I might have to defer to his representative because I think he was put into early retirement because of his injury.

"THE COURT: He retired at 62, if I recall Mr. Turner's statement correctly. At 65 there would have been compulsory retirement. Has he reached the age of 65 now?

"MR. LILLY: I imagine so, Your Honor.

"THE COURT: In other words, the purpose of workmen's compensation is not to compensate a person for pain and suffering as it is in an ordinary personal injury action, but it is to compensate him for his inability to earn his living by his work. But he wouldn't be working, anyway, because he is retired and getting a pension.

"MR. LILLY: Well, perhaps, Your Honor, we shouldn't say that a man who is 65 could not continue to work in some capacity even though —

"THE COURT: Of course he can continue to work in some capacity, but the point is that he has retired.

"Well, it may be that what I am saying does not bear on the legal rights of the parties, but it does seem to me to bear on the equities of the situation.

"MR. LILLY: I might agree with that, Your Honor, but I do think they are separate situations and this man does come under the Act." (JA 8-21)

When the Court inquired about the pension system, this issue was being raised for the first time. A review of the record before the Deputy Commissioner clearly indicates that the employer at the time of the formal hearing, an administrative proceeding, made no mention of

any issue concerning the legality of an employee of the appellee receiving both retirement benefits and workmen's compensation. In view of the contents of the Agreement set forth above, it is obvious why no such issue was raised by the appellee. Indeed the employer could not have taken such a position. To have done so would have flown in the face of the Agreement to which it was bound.

This Court has clearly set forth the law under these circumstances. IN a case somewhat similar to this appeal, the District Court upheld the findings of the Deputy Commissioner. However, the District Court, *sua sponte*, noted an additional finding which it set aside. The defendant strenuously objected to this action on the ground that the issue was not urged either in the administrative proceeding or in the complaint. In *Britton* v. *Great American Indemnity Company*, 110 U.S. App. D. C. 190, 290 F.2d 381 (1961), this Court stated:

> "We agree with the District Court that the record supports the findings of the Deputy Commissioner challenged in the complaint. But we think that the court erred in considering the issue which it raised, sua sponte.
>
> "In the formal pleadings and pre-hearing procedures before the Deputy Commissioner, the employer and its carrier denied, *inter alia*, the allegation that the homicides arose out of and in the course of employment. But at the hearing, in response to the Deputy Commissioner's effort to fix the issues for contest, counsel specifically limited its denials to the allegations of employer-employee relationship, wages and dependency. Thus the claimants were entitled to believe, as the Deputy Commissioner asserts they did, that the employer and its carrier had withdrawn their denial of the allegation now in question. The District Court read some of the evidence thereafter adduced at the hearing as disproving that allegation. It may not be assumed, however, that the claimants would have been unable to present countervailing

> evidence even if they had not been led to believe that the issues had been withdrawn. *Maryland Casualty Co. v. Cardillo*, 1939, 71 App. D.C. 160, 107 F.2d 959; *Metropolitan Casualty Ins. Co.* v. *Hoage*, 1937, 67 App. D.C. 54, 89 F.2d 798."

See also: *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11. Affirmed 331 F.2d 1020, 118 U.S. App. D.C. 100, certiorari denied 84 S. Ct. 1181, 377 U.S. 918, 12 L. Ed. 2d 187 and 84 S. Ct. 1182, 377 U.S. 918, 12 L.Ed. 2d 187; *U.S.* v. *I. C. C.*, 221 F. Supp. 584; *Eustace* v. *Day*, 198 F. Supp. 233, affirmed 314 F.2d 247, 114 U.S. App. D.C. 242.

Thus it can be readily seen that by raising an issue during oral argument on the Motion for Summary Judgment not previously raised by the appellee the Trial Court committed reversible error. In his opinion the Trial Judge stated:

> "It follows hence that to allow workmen's compensation over and above his pension, in effect constitutes double payment." (JA 26)

By so ruling, the appellant Mr. White had no opportunity to submit the Agreement which specifically referred to this issue. The evidence and testimony taken during the formal hearing before the Deputy Commissioner was the record which the Trial Court could review. Having agreed that the findings of the Deputy Commissioner were in accordance with law, the order of the Deputy Commissioner should have been affirmed by the Trial Court. The decision remanding the case with instructions to modify the award and terminate compensation benefits was completely erroneous.

III

A GENUINE ISSUE OF FACT WAS CREATED BY THE TRIAL COURT'S OWN ACTION AND THUS SUMMARY JUDGMENT WAS IMPROPERLY GRANTED

The Trial Court compounded its error by granting the appellee's Motion for Summary Judgment. Rule 56, Federal Rules of Civil Procedure, provided in pertinent part:

> "The judgment sought shall be rendered forthwith if the pleadings . . . show there is no genuine issue as to any material fact . . . ."

Certainly when the Trial Court inquired about the appellee's pension system, an issue of material fact was raised which should have precluded its decision remanding the case to the Deputy Commissioner with instructions to modify the award and terminate compensation benefits. Time and again this Court has ruled that when a genuine issue of material fact exists summary judgment cannot be granted. *Wittlin* v. *Giacalone*, 20, 81 U.S. 154 F.2d App. D. C. 20 (1946); *Vale* v. *Bonnett*, 111 U.S. App. D. C. 319, 191 F.2d 334, 89 U.S. App. D. C. 116 (1951); *Guinn Co.* v. *Mazza*, 296 F.2d 441 (1961); *Corley v. Life and Casualty Co.*, U.S. App. D. C. 327, No. 16270, November 2, 1961; *Orvis* v. *Buckman*, 90 U.S. App. D. C. 266, 196 F.2d 762 (1951).

CONCLUSION

The union, as *Amicus Curiae*, respectfully submits that the decision of the Trial Court in granting the appellee's Motion for Summary Judgment is completely erroneous.

For the reasons set forth above, the award of the Deputy Commissioner should be affirmed.

Respectfully submitted,

JOSEPH H. KOONZ, JR.
LEE C. ASHCRAFT
MARTIN E. GEREL

Ashcraft and Gerel
925-15th Street, N.W.
Washington, D. C. 20005

Attorneys for Amicus Curiae

Division 689 of the Amalgamated
Association of Street, Electric
Railway and Motor Coach
Employees of America, AFL-CIO